

FILE COPY

FILED

APR 23 1947

In the Supreme Court

CHARLES ELMORE ORFLEY
CLERK

OF THE
United States

OCTOBER TERM, 1946

No. 1281

G. E. GRAY, J. C. PITTS, and FLOYD BROWN,

Petitioners,

vs.

COMMODITY CREDIT CORPORATION

(a corporation),

Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit,

and

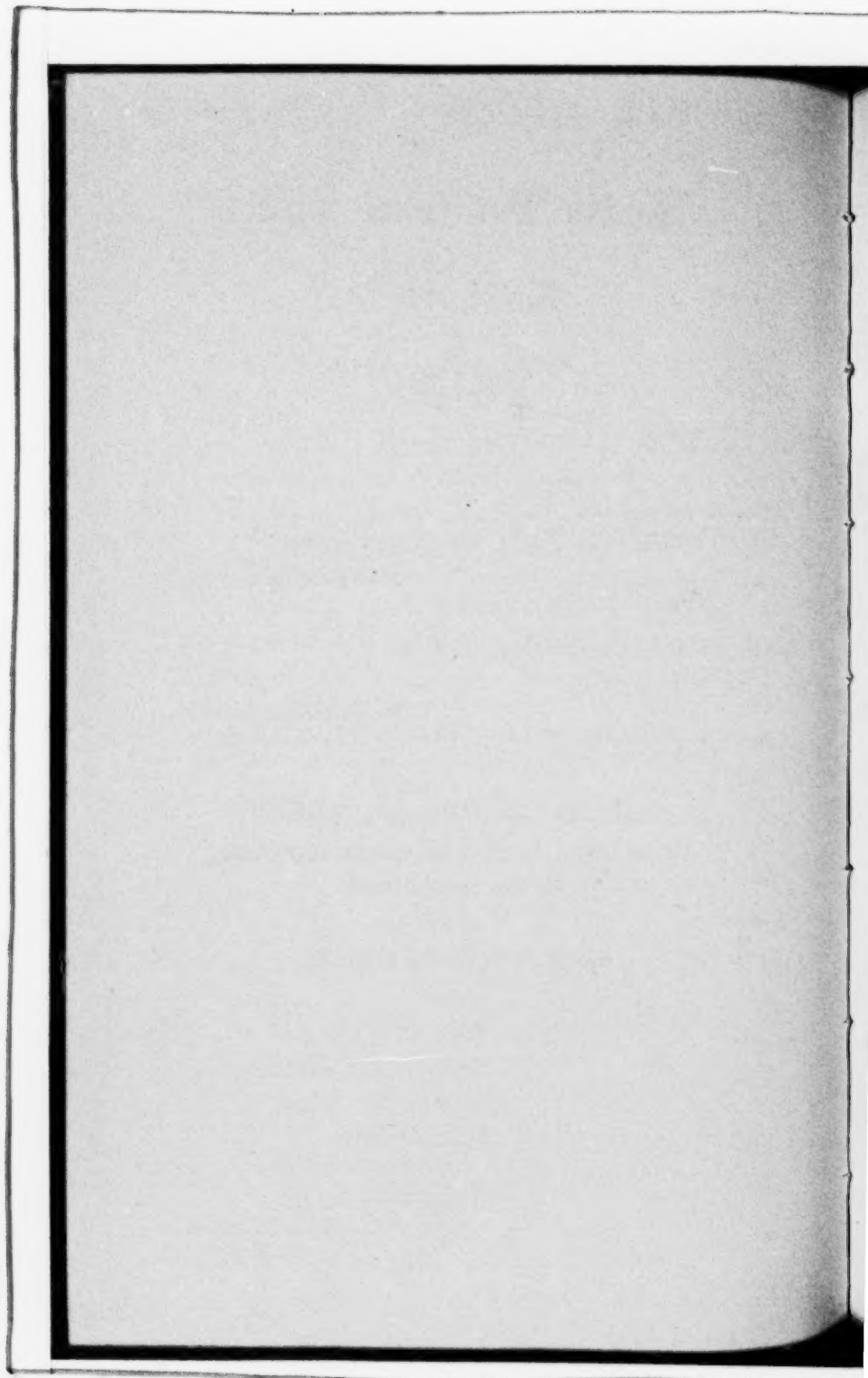
BRIEF IN SUPPORT THEREOF.

DENVER S. CHURCH,
DAVID E. PECKINPAH,
HAROLD M. CHILD,
L. N. BARBER,

431 Brix Building, Fresno 1, California,

ROGER R. WALCH,
Court House, Hanford, California,

Attorneys for Petitioners.



Subject Index

	Page
Petition for writ of certiorari.....	1
Brief in support of petition.....	7
I. The compulsory sale of private property to a govern- ment agency is a taking of such property within the meaning of the 5th Amendment	7
II. Private property cannot be taken except for public use	9
III. Payment of proceeds of the sale of Muscat raisins to growers of other varieties is a taking of the property of Muscat growers for the private benefit of other persons	10
IV. The contract can be so interpreted as not to deprive the Muscat growers of any substantial right.....	16
V. Petitioners are not estopped by acceptance of pay- ments on delivery	18
Conclusion	21
Appendix	i-vii

Table of Authorities Cited

Cases	Pages
A. T. & S. F. R.R. Co. v. O'Connor, 223 U. S. 280, 56 L.ed. 436, 32 S.Ct. 216	19
Abie State Bank v. Bryan, 282 U. S. 765, 75 L.ed. 690, 51 S.Ct. 252	19
Chicago St. P. M. & O. Ry. Co. v. Holmberg, 282 U. S. 162, 75 L.ed. 270, 51 S.Ct. 56	10
Citizens Savings & Loan Assn. v. Topeka, 20 Wall. 655, 22 L.ed. 455	10
Cole v. LaGrange, 113 U. S. 1, 28 L.ed. 896, 5 S.Ct. 416....	9
Fidelity & Deposit Co. v. Tafoya, 270 U. S. 426, 70 L.ed. 664, 46 S.Ct. 331	8
Frost v. R.R. Commission, 271 U. S. 283, 70 L.ed. 1101, 46 S.Ct. 605	8
Home Ins. Co. v. Morse, 20 Wall. 455, 22 L.ed. 365.....	8, 19
Mo. Pac. Ry. Co. v. Nebraska, 164 U. S. 403, 41 L.ed. 489, 17 S.Ct. 130	10
Mugler v. Kansas, 123 U. S. 623, 31 L.ed. 205, 8 S.Ct. 273	8
Myles Salt Co. v. Board of Commissioners, 239 U. S. 478, 60 L.ed. 392, 36 S.Ct. 204, L.R.A. 1918E 190.....	10
Railroad Retirement Board v. Alton R. Co., 295 U. S. 330, 79 L.ed. 1468, 55 S.Ct. 240.....	6, 10
Robinson v. Booth-Orchard Grove Ditch Co., 94 Colo. 515, 31 Pac. (2d) 487	18
Thompson v. Consolidated Gas Utilities Corp., 300 U. S. 55, 81 L.ed. 510, 57 S.Ct. 364	6, 9, 10
Union Pac. R.R. Co. v. R.R. Commission, 248 U. S. 67, 61 L.ed. 131, 39 S.Ct. 24	8, 19
U. S. v. Butler, 297 U. S. 1, 80 L.ed. 477, 52 S.Ct. 312.....	10, 19
U. S. v. Rock Royal Co-op., 307 U. S. 533, 83 L.ed. 1446, 59 S.Ct. 993	10, 16

TABLE OF AUTHORITIES CITED

iii

	Page
Western Union Tel. Co. v. Foster, 246 U. S. 105, 62 L.ed. 1006, 38 S.Ct. 438, 1 A.L.R. 1278.....	8
Western Union Tel. Co. v. Kansas, 216 U. S. 1, 54 L.ed. 355, 30 S.Ct. 190	8

Text Books

11 Am. Jur. 767	19
13 C. J. 625	19

Statutes

Civil Code of California, Section 1655	17
U. S. Code, Title 28, Section 347 (a)	4

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1946

No.

G. E. GRAY, J. C. PITTS, and FLOYD BROWN,

Petitioners,

vs.

COMMODITY CREDIT CORPORATION

(a corporation),

Respondent.

PETITION FOR WRIT OF CERTIORARI.

*To the Honorable Fred M. Vinson, Chief Justice, of
the United States, and to the Honorable Associate
Justices of the Supreme Court of the United
States:*

Petitioners above named respectfully apply for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit, to review the judgment of the said Court in the cause entitled G. E.

Gray, J. C. Pitts, and Floyd Brown, Appellants v. Commodity Credit Corporation, Appellee, No. 11,287. The following is a summary of the matter involved:

During the season of 1944 the War Food Administrator, by regulation, prohibited the growers of raisin varieties of grapes from making any disposition of their grapes except (1) to convert them to raisins or sell them to dehydrators for such conversion, or (2) to sell them to the Office of Distribution of the War Food Administration, or a corporate agency thereof. The Commodity Credit Corporation was a corporate agency of the Office of Distribution and was authorized to purchase (1) raisin grapes not suitable for making into standard grade raisins (2) substandard grade raisins, and (3) such quantities of raisin variety grapes as the War Food Administration might determine to be in excess of the quantity needed for conversion to raisins. No restrictions were placed on the sale of raisins but the War Food Administration granted no permission for the sale of fresh raisin grapes to any purchaser except the Commodity Credit Corporation. The Commodity Credit Corporation would not purchase such grapes unless the grower would sign a standard form of contract from which no variation was permitted. A support price was fixed for raisins and maintained by the payment of subsidies to the processors. The standard contract for the purchase of fresh grapes and raisins which the Commodity Credit Corporation was authorized to purchase provided for payments on delivery, which were so fixed as to be equivalent to the return which

the growers would have received from the grapes if converted to raisins and sold at the support price. The contract further provided for the sale of such grapes and raisins by the Commodity Credit Corporation and payment from the proceeds of the sale of the sum of \$10.00 per dried ton to all growers who converted their grapes to raisins. After deducting the amount of such payments and the expenses of the sale, the remaining proceeds were to be distributed "pro rata on a fresh tonnage basis" to all growers of raisin variety grapes, including those who converted their grapes to raisins as well as those who sold them to the Commodity Credit Corporation, conversion factors being specified in the contract for the purpose of converting raisin tonnage to fresh tonnage. The Commodity Credit Corporation sold the grapes to wineries and fresh grape shippers at prices approximately double those paid to growers. The \$10.00 payments have been made and the net proceeds are ready for distribution. The Commodity Credit Corporation now interprets the distribution clause of the contract to mean that the producers of all varieties of raisin grapes shall be entitled to share equally according to tonnage in the entire fund, without regard to the variety of grapes which they may have contributed.

The principal varieties of raisin grapes are Muscats and Thompson Seedless. The proportion of the Thompson Seedless crop required for raisins was much greater than the proportion of the Muscat crop required for that purpose. The result is that although the aggregate tonnage of the Thompson Seedless crop

was many times that of the Muscat, more than one-half of the profits made by the Commodity Credit Corporation from the sale of the grapes was derived from the Muscata. If the proceeds from the sale of Muscats were distributed to Muscat growers alone they would receive \$22.49 per ton, but if the entire fund were distributed to all growers at a uniform rate per ton each would receive approximately \$4.83 per ton.

The petitioners represent the Muscat growers and their position is that the distribution of the proceeds of the sale of their grapes to growers of other varieties will deprive them of their property without due process of law. They ask for relief in the alternative, either that the contract be declared by the Court to mean that the proceeds from the sale of each variety shall be distributed only to growers of that variety, or that the contracts be set aside and the proceeds distributed to each grower according to his contribution to the fund.

The case was submitted to the District Court on an agreed statement of facts and judgment was rendered for the defendant on all points, and affirmed by the Circuit Court of Appeals.

This Court has jurisdiction to review the judgment in question by virtue of the provisions of Subdivision (a) of Section 347 of Title 28 of the U. S. Code, which provides that in any case, civil or criminal, in a circuit court of appeals, it shall be competent, upon the petition of any party thereto, to require by certiorari,

either before or after the judgment or decree by such lower Court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted appeal. The judgment in question was entered by the Circuit Court of Appeals on the 28th day of January, 1947.

The questions presented are the following:

1. Will the Muscat grape growers be deprived of their property without due process of law by the payment of a part of the proceeds of the sale of their grapes to growers of other varieties?

2. Is there provision implied in the contract that the net proceeds of the sale of the grapes shall be segregated according to the variety of grapes from which they are derived, so that the proceeds of the sale of each variety shall be paid only to producers of that variety.

3. Are the petitioners estopped to set up the invalidity of the contracts by reason of having accepted the payments made upon delivery of grapes under the contracts?

The last two questions are incidental and relate to the matter of relief which can be granted to the petitioners rather than to the principal question involved, which is, in substance, whether or not the producers of a given commodity may be required, by the action of an agency of the federal government in closing other channels for the distribution of their product, to enter into a contract which provides for the sharing

of the proceeds of the sale of the product with producers of some other commodity. That is an important question of federal law which has not been, but should be decided by this Court, and which has been decided by the Court below in a way probably in conflict with applicable decisions of this Court. (*Thompson v. Consolidated Gas Utilities Corp.*, 300 U. S. 55, 81 L. ed. 510, 57 S. Ct. 364; *Railroad Retirement Board v. Alton R. Co.*, 295 U. S. 330, 79 L. ed. 1468, 55 S. Ct. 240.)

Dated, Fresno, California,

April 16, 1947.

DENVER S. CHURCH,

DAVID E. PECKINPAH,

HAROLD M. CHILD,

L. N. BARBER,

ROGER R. WALCH,

Attorneys for Petitioners.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.**I.****THE COMPULSORY SALE OF PRIVATE PROPERTY TO A GOVERNMENT AGENCY IS A TAKING OF SUCH PROPERTY WITHIN THE MEANING OF THE 5TH AMENDMENT.**

On July 20, 1944, the War Food Administration issued an amended order known as War Food Order No. 17, a copy of which is attached hereto as an appendix. The effect of this order was to prohibit the sale of fresh grapes of the varieties mentioned in the order, to-wit: Muscat, Thompson, Seedless, Sultana and Zante Currant, without a permit from the Director of Distribution. With minor exceptions which are not material here, the Director refused to authorize the sale of any fresh grapes of those varieties except to the Commodity Credit Corporation, which is a corporate agency of the Office of Distribution. (R. 63.) The Commodity Credit Corporation purchased only grapes and raisins in the following categories: (a) raisin variety grapes not suitable for conversion into standard quality raisins; (b) damaged or substandard quality raisins, and (c) such quantities of raisin variety grapes as might be produced in excess of the amount determined by the War Food Administrator to be needed for conversion to raisins. It purchased such grapes or raisins from a grower only if he signed a printed contract in a standard form, and it would not accept signatures under protest or changes in the printed terms of the contract. (R. 64.) The printed form provided only for the sale of grapes

or raisins in the categories above mentioned. (R. 92, 9.) The price paid the growers for fresh Muscat grapes was \$50.00 per ton. That price was calculated to give the grower the same return as he would have received for his grapes if sold to a dehydrator or dry-yard operator, or if he had converted them into natural condition raisins and sold them as such. (R. 72.) The Commodity Credit Corporation sold the Muscat grapes for \$100.00 per ton. (R. 74.)

It is an established principle of constitutional law that in determining whether the limits of authority have been exceeded the Courts will not regard mere forms, but will look through forms to the substance of things. (*Western Union Tel. Co. v. Kansas*, 216 U. S. 1, 54 L. ed. 355, 30 S. Ct. 190; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 S. Ct. 273.)

It is also a well established principle of constitutional law that a power which is granted by the constitution cannot be used as a means to secure an end which is prohibited. (*Home Ins. Co. v. Morse*, 20 Wall. 445, 22 L. ed. 365; *Western Union Tel. Co. v. Foster*, 246 U. S. 105, 62 L. ed. 1006, 38 S. Ct. 438, 1 A.L.R. 1278; *Union Pac. RR. Co. v. R.R. Commission*, 248 U. S. 67, 61 L. ed. 131, 39 S. Ct. 24; *Fidelity and Deposit Co. v. Tafoya*, 270 U. S. 426, 70 L. ed. 664, 46 S. Ct. 331; *Frost v. R.R. Commission*, 271 U. S. 283, 70 L. ed. 1101, 46 S. Ct. 605.)

Here the power of the War Food Administration to require the conversion of grapes to raisins in order to increase their usefulness as food is not open to

question, but the power was used for the purpose of obtaining title through a government agency to the surplus grapes which were not required for conversion to raisins.

II.

PRIVATE PROPERTY CANNOT BE TAKEN EXCEPT FOR PUBLIC USE.

The surplus was not taken for public use, but for sale by the Commodity Credit Corporation through the ordinary private commercial channels. The Fifth Amendment prohibits the taking of private property for public use without just compensation, and that implies that private property cannot be taken for other than public use, even when just compensation is made. (*Cole v. LaGrange*, 113 U. S. 1, 28 L. ed. 896, 5 S. Ct. 416; *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55, 81 L. ed. 510, 57 S. Ct. 364.) To take private property for the purpose of selling it at a profit for the benefit of the public treasury or some other private individual would be a peculiarly odious form of tyranny.

There are numerous decisions of this Court in cases in which both Congress and the States have attempted, by the exercise of powers which they undoubtedly possessed, to accomplish the ulterior purpose of benefiting some private individual or individuals at the expense of others. Among the powers which it has been held could not be thus misused are those of taxation (*Citizens Savings & Loan Assn. v. Topeka*, 20

Wall. 655, 22 L. ed. 455; *U. S. v. Butler*, 297 U. S. 1, 80 L. ed. 477, 52 S. Ct. 312), of fixing the boundaries of drainage districts (*Myles Salt Co. v. Board of Commissioners*, 239 U. S. 478, 60 L. ed. 392, 36 S. Ct. 204, L.R.A. 1918E 190), regulating common carriers (*Mo. Pac. Ry. Co. v. Nebraska*, 164 U. S. 403, 41 L. ed. 489, 17 S. Ct. 130; *Chicago St. P. M. & O. Ry. Co. v. Holmberg*, 282 U. S. 162, 75 L. ed. 270, 51 S. Ct. 56; *R. R. Retirement Board v. Alton R.R. Co.*, 295 U. S. 330, 79 L. ed. 1468, 55 S. Ct. 240), and regulating the production of natural gas (*Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55, 81 L. ed. 510, 57 S. Ct. 364.)

III.

PAYMENT OF PROCEEDS OF THE SALE OF MUSCAT RAISINS TO GROWERS OF OTHER VARIETIES IS A TAKING OF THE PROPERTY OF MUSCAT GROWERS FOR THE PRIVATE BENEFIT OF OTHER PERSONS.

The State of California has an agricultural prorate law which has been upheld by this Court and the Supreme Court of the State, and, in *U. S. v. Rock Royal Co-op.*, 307 U. S. 533, 83 L. ed. 1446, 59 S. Ct. 993, this Court approved the compulsory pooling of the proceeds of milk when sold at varying prices for different purposes, such as table milk, cream, butter, cheese, etc., where it appeared that the return to the producer varied with the use for which the milk was purchased. In view of this decision we have accepted as proper the pooling of the proceeds from the sale of surplus raisin variety grapes to the wineries and fresh

grape shippers with the proceeds from the sale of raisins, in order to equalize the burden of furnishing food for the support of the war effort, but that does not justify the distribution of the proceeds of the sale of different varieties from a common pool at a uniform rate per ton.

The compulsory pooling of agricultural products for marketing purposes has been accepted in principle, but there has yet been no decision in a case where the participants in the pool complained that they were deprived of their property without due process of law by reason of the method adopted for the distribution of the net proceeds. This is a case of first impression upon that point and calls for a definition of the rules by which such distribution must be governed if it is to conform to the requirements of the Fifth and Fourteenth Amendments. The District Court dismissed the question with the suggestion that no individual had any right to complain of the compensation received for his property so long as the lives of others were being sacrificed in war, and the Circuit Court of Appeals adopted the opinion of the lower Court. That approach to the question is more emotional than realistic, since this Court has never sanctioned departure in time of war from the rules which govern the taking of private property in time of peace. The methods of taxation, condemnation and requisition are the same in war as in peace.

When it is carried out with due respect to constitutional limitations, compulsory pooling for marketing purposes is not necessarily a taking of property,

but may be accepted as regulation of commerce, and in some instances the administration of the pool through a government agency may be accepted as a proper means of regulation. But regulation ends and taking of property without due process of law begins when the proceeds derived from the sale of one man's property are given to another. The validity of laws and regulations requiring marketing through governmentally operated pools is dependent upon classification of commodities according to variety, quality and grade, so that only producers of like commodities share in a common fund. If, for example, the proceeds of the sale of wheat and corn were placed in a common pool and distributed to the producers of both at a uniform rate per bushel, it is evident that the producers of wheat would be deprived of their property without due process of law, because a bushel of wheat is always worth more than a bushel of corn. The present case calls for the application of the same principle, but there are two complicating factors which tend to introduce confusion in the application of the principle to this case. First, it has been deemed proper to require the division of the surplus fund upon an equal basis between those who dried their grapes and those who sold them fresh, in order to place those whose grapes were selected by the War Food Administration for the production of essential food upon an equality with those whose grapes were not so selected. Secondly, an arbitrary differential of \$7.00 per ton was paid for fresh Muscats over and above the price paid for the Thompsons and Sultanas.

The four varieties of grapes which were included in the provisions of War Food Order No. 17 differ widely in their adaptability to the principal uses to which raisin variety grapes are put, namely, raisin, wine and table use. The Zante Currant, which is not a true currant but a grape, is used only for raisins. The Thompson Seedless is used for all three purposes, but predominantly for raisins. The Muscat and Sultana varieties are used both for wines and raisins, but the quantity of those varieties used for raisins is much smaller both absolutely and in relation to total production than the Thompsons. (R. 49, 50, 58.) Consequently, in 1944, when the War Food Administrator found it necessary to utilize the war powers of the government to procure the necessary supply of raisins, he took for that purpose all of the Zante Currants, 92.6% of the Thompson Seedless crop, 55.6% of the Sultana, and 52.7% of the Muscat. (R. 59.) In this he acted reasonably and the proportion of the respective crops which he required to be converted to raisins was not the result of accident or caprice, but was fixed in response to the public need. The injustice of requiring the Muscat growers to compensate the Zante Currant growers for converting their grapes to raisins when they could not have used them for anything else is at once apparent. Similarly, the fact that the War Food Administration required the Thompson Seedless growers to devote such a large proportion of their crop to the less profitable use fails to furnish any logical reason for compelling the producers of some other commodity to help make good the loss.

During the last three years before the United States entered the war and before any controls were in force, the percentages of the total crops of the respective varieties (exclusive of Zante Currants) used for raisins were as follows:

	<u>Muscat</u>	<u>Sultana</u>	<u>Thompson</u>	
1939	44.8	62.3	81.2	(R. 49)
1940	12.	25.2	64.5	(R. 49)
1941	16.7	22.3	64.5	(R. 50)

In 1944 the proportion of Muscats used for raisins was more than three times that used in the last year of uncontrolled marketing, while the proportion of the Thompson Seedless used for that purpose was increased by less than 50%. Certainly the Thompson growers could not justly claim compensation from the Muscat growers on account of being more unfavorably affected by the government control program.

It was, of course, to be anticipated that the compulsory drying program would disturb the normal balance between the prices offered for raisin variety grapes for their various uses and create a wide gap between the prices received for raisins and for fresh grapes. The purpose of pooling the excess and distributing it on an equal basis to those who sold their grapes fresh and those who converted them to raisins was to avoid a situation in which it would be relatively disadvantageous for a grower to dispose of his grapes in raisin channels; to eliminate any financial incentive to divert grapes from raisin channels; to avoid the possibility that a grower whose grapes were devoted

to the essential raisin use would derive smaller financial return than one whose grapes were devoted to the less important non-raisin use, in consequence of the market price differential favoring non-raisin uses. (R. 65, 66.)

All this is sound enough when applied as between growers of the same variety of grapes, but it is obvious that the higher price of fresh Muscat grapes could furnish no financial incentive for a grower of Thompson Seedless to divert his grapes from raisin channels, nor could it subject him to any disadvantage in converting his grapes to raisins or make it possible for one Thompson grower to obtain a greater financial return than another. The return being equalized as between growers of the same varieties, the result of further equalizing it as between the different varieties would be to impose an equal burden upon all the growers of Muscats whether they converted their grapes to raisins or not, and to benefit equally the growers of the other varieties without regard to their sacrifice to the war effort. It could contribute to no public purpose, but would serve merely to equalize wealth between individuals upon communistic principles, in violation of our constitutional guaranty of the right of private property.

Under the standard form contracts the Commodity Credit Corporation paid for fresh Muscat grapes on delivery \$7.00 per ton more than it paid for Thompsons and Sultanas. According to the view taken by the Circuit Court of Appeals, the payment of this arbi-

trary differential in price fully compensated the Muscat growers for any difference in value between their grapes and those of other varieties and satisfied the requirement of due process of law. That presupposes that the constitutional requirement could be satisfied by payment of just compensation, but that is true only when property is taken for public use. Here the property was not taken for public use and the authority of the government was limited to regulating the channels of distribution. It had no power to appropriate the proceeds of the operation to its own use or to the use of any private individual, but could only return such proceeds to the owners of the property taken, less the reasonable cost of distribution. The owner cannot be required to accept compensation, however just it may be, but is entitled to the identical sum received by the government for his property, less the necessary expenses.

IV.

THE CONTRACT CAN BE SO INTERPRETED AS NOT TO DEPRIVE THE MUSCAT GROWERS OF ANY SUBSTANTIAL RIGHT.

As we interpret the decision in the *Rock Royal* case, the Muscat growers will not be deprived of any substantial right if the portion of the funds in the hands of the Commodity Credit Corporation which was derived from the sale of Muscats is distributed in proportion to fresh tonnage to those Muscat growers who converted their grapes to raisins, as well as to those

who sold them fresh, since fresh Muscat grapes are convertible to Muscat raisins. Petitioners believe that the contracts can be so interpreted as to permit that method of distribution. The standard form contract, after providing for the payment of the cost of the grapes and raisins and the incidental expenses of the sale, and the payment of \$10.00 per ton to all producers of raisins, proceeds as follows:

"The balance of the fund, if any, will be distributed pro rata on a fresh tonnage basis to all growers of raisin variety grapes * * *." (R. 14.) The contracts were made in California (R. 71, 66) and the California Civil Code (Sec. 1655) provides as follows: "Stipulations which are necessary to make a contract reasonable, or conformable to usage, are implied, in respect to matters concerning which the contract manifests no contrary intention."

Webster's New International Dictionary defines "pro rata" as "in proportion; proportionately; according to share, interest or liability of each," and "basis" as, "the principal component part of a thing; the ground work; the first or fundamental principle". To distribute the fund pro rata on a fresh tonnage basis to all growers is to distribute it according to the share or interest of each, fresh tonnage being the principal component part or ground work of the plan of distribution. It does not exclude classification of the participants into groups having separable interests, and division of the fund according to such classification.

In *Robinson v. Booth-Orchard Grove Ditch Co.*, 94 Colo. 515, 31 Pac. (2d) 487, the Supreme Court of the state had before it a statute providing for assessments by irrigation companies "to be levied pro rata on the shares of stock". The Court said: "Where stock, as here, is divided into different classes, each entitled to a different use, and varying, therefore, in benefits from maintenance, the pro rata mandate requires only that costs shall be equitably proportioned between the classes and that the assessment on each share in a given class be the same."

That case is authority for the proposition that where, in a pooling scheme such as that involved in this case, several different varieties are involved, the provision for pro rata distribution requires that the proceeds be divided among the different varieties according to the amount contributed by each and that the payment for each unit of a given variety be the same. While that case is the only one we have been able to find directly involving a similar use of the words "pro rata", the proposition seems to be too well grounded in reason and commercial usage to be successfully disputed.

V.

PETITIONERS ARE NOT ESTOPPED BY ACCEPTANCE OF PAYMENTS ON DELIVERY.

The defense of estoppel applies only to the alternative request for a rescission of the contract and is not available with respect to the question of its interpreta-

tion. If the Court should determine the question of interpretation according to the contention of petitioners, judgment for petitioners would necessarily follow, even though they might have been estopped to claim a revocation of the contracts in the event that the question of interpretation were determined against them.

But, even as against the claim of rescission of the contracts, the defense of estoppel upon the ground of acceptance of benefits by petitioners is not available under the circumstances of this case. The principle that one who accepts the benefit of a statute or regulation waives the right to question its validity applies only when such acceptance is voluntary. (11 Am. Jur. 767.) Acceptance is not voluntary, where non-compliance will result in the loss of a valuable right. (*Home Ins. Co. v. Morse*, 20 Wall. 455, 22 L. ed. 365; *A. T. & S.F. R.R. Co. v. O'Conner*, 223 U. S. 280, 56 L. ed. 436, 32 S. Ct. 216; *Union Pac. R.R. Co. v. R.R. Commission*, 248 U. S. 67, 63 L. ed. 131, 39 S. Ct. 24; *Abie State Bank v. Bryan*, 282 U. S. 765, 75 L. ed. 690, 51 S. Ct. 252; *U. S. v. Butler*, 297 U. S. 1, 80 L. ed. 477, 52 S. Ct. 312.) The influence of the duress must be removed before the conduct becomes voluntary, and, after that, acts charged as constituting an affirmance must be such as to indicate an intention to condone the wrong and the purpose to abide the consequences. (13 C. J. 625.)

The grapes which the petitioners sold to the Commodity Credit Corporation were surplus which had been determined by the War Food Administrator to

be in excess of the quantity required for conversion to raisins. To require them to be converted to raisins would be in excess of the war powers granted by Congress, and to prohibit their sale altogether would be a plain violation of the 5th Amendment. Yet, those were the two alternatives from which the grower must choose if he refused to sign the contract with which he was presented when he sought to avail himself of the privilege of selling to the Commodity Credit Corporation. That was compulsion and if it was applied for the purpose of compelling him to surrender a right guaranteed by the constitution, it constituted duress as defined in the decisions above cited. The contract provided for payments to be made when the weight of the delivered grapes was ascertained (R. 13), and acceptance of such payments was prompted by the same necessity which dictated the signing of the contract and the delivery of the grapes. It was the only means of obtaining money for the crop.

It was contended that petitioners were estopped because two of them converted part of their grapes to raisins and accepted the payments which the contract required to be made on account of such conversion. Those payments were not made to them on account of the grapes which they sold to the Commodity Credit Corporation, but were payments which the contracts required them to make for the benefit of growers of other grapes. They would be entitled to such payments whether they signed the contracts or not. Consequently, accepting them would not be an affirmance of the contracts nor could acceptance by

two of them estop the third, who received none. It could not justify the judgment which was entered denying all relief.

CONCLUSION.

The District Court and the Circuit Court, which adopted its opinion, made the error of considering the action of the War Food Administration only as regulation and overlooked the distinction between regulation and the taking of property. Regulation complies with the constitutional requirement of due process of law if it is based upon reason, but the taking of private property by the government, except for public use, is absolutely prohibited. Compulsory sale of private property to an agency of the government for resale in the ordinary course of trade may be a regulatory measure if the profits made on the resale are returned to the original vendor, but if they are appropriated to the use of the government or some private individual other than the owner, it is confiscation. The rule that the Court looks beyond the form to the substance of the transaction, in determining whether or not a constitutional limitation of power has been exceeded, is necessary to prevent the breaking down of the barriers of the Bill of Rights by gradual stages. The idea of compulsory pooling of agricultural products for marketing purposes, as exemplified in the Agricultural Marketing Agreement Act and the California Prorate Act, is of comparatively recent origin and no one can forecast its future.

It might be extended to other fields than agriculture. The decision of the Court below squarely holds that all a participant in such a pool is entitled to receive is reasonable compensation for his property and that if he is paid such a price as may appear to be reasonable when his property is delivered to the pool, all the proceeds derived from the operation of the pool belong to the state, to dispose of in such manner as it may consider just. The producer must accept such compensation as the state may fix, although his property is not taken for public use and may be disposed of through private channels at a profit for the benefit of other persons. This doctrine is a stranger to our constitutional system and its rejection is imperative.

The petition for a writ of certiorari should be granted so that this important question may receive a final decision.

Dated, Fresno, California,
April 16, 1947.

Respectfully submitted,

DENVER S. CHURCH,
DAVID E. PECKINPAH,
HAROLD M. CHILD,
L. N. BARBER,
ROGER R. WALCH,

Attorneys for Petitioners.

(Appendix Follows.)

Appendix

WAR FOOD ADMINISTRATION

(WFO 17, Amdt. 5)

Part 1407 - - - Dried Fruit.

RAISIN VARIETY GRAPES, ZANTE CURRANT GRAPES, RAISINS, AND ZANTE CURRANTS.

War Food Order No. 17, as amended, 9 F.R. 4321, 4319 (formerly designated as Food Distribution Order No. 17, as originally issued by the Secretary of Agriculture on January 30, 1943, and as amended, 8 F.R. 1706, 12042), is further amended to read as follows:

1407.2 *Restrictions relative to raisin variety grapes. Zante currant grapes, raisins, and Zante currants—*

(a) *Definitions.* (1) "Person" means any individual, partnership, corporation, association, business trust, or any organized group of persons, whether incorporated or not.

(2) "Director" means the Director of Distribution, War Food Administration.

(3) "Raisin variety grapes" means Thompson Seedless, Muscat, and Sultana grapes, grown in Fresno, Kern, Kings, Madera, Merced, Stanislaus, San Joaquin, or Tulare Counties in the State of California, in the fresh or partially dried form.

(4) "Zante currant grapes" means the grapes of the Zante currant variety, grown in Fresno, Kern, Kings, Madera, Merced, Stanislaus, San Joaquin, or

Tulare Counties in the State of California, in the fresh or partially dried form.

(5) "Raisins" means raisin variety grapes preserved by the removal of a part of the natural moisture, and includes such fruit in the processed or unprocessed condition.

(6) "Zante currants" means Zante currant grapes preserved by the removal of a part of the natural moisture, and includes such fruit in the processed or unprocessed condition.

(7) "Processing" means grading, sizing, stemming, seeding, or treating raisins or Zante currants by the use of water, steam, chemicals, or compressed or hot air.

(8) "Producer" means any person engaged in the production of raisin variety grapes or Zante currant grapes; and such term includes, but is not limited to, any owner of such grapes at the time of the harvesting or picking of such grapes.

(9) "Packer" means any person engaged in the business of processing and packaging raisins or Zante currants.

(10) "Dehydrator" means any person engaged in the business of drying raisin variety grapes or Zante currant grapes by the use of artificial heat or by sun drying.

(b) *Restrictions.* (1) No producer may sell or deliver any raisin variety grapes or any Zante currant grapes, except (i) the Office of Distribution (in-

cluding, but not being limited to, any corporate agency thereof), or (ii) any person designated by the Director, or (iii) any dehydrator for the purpose of converting such grapes into raisins or Zante currants. No producer may, unless specifically authorized by the Director, use more than 100 pounds of raisin variety grapes or Zante currant grapes during each calendar year for any purpose other than for conversion into raisins or Zante currants.

(2) No person may, unless specifically authorized by the Director, purchase or accept delivery of any raisin variety grapes or any Zante currant grapes for any purpose other than for conversion into raisins or Zante currants.

(3) No person may, unless specifically authorized by the Director, purchase, accept delivery of, or use any raisins or any Zante currants for conversion into alcohol, brandy, wine, or other beverage (whether alcoholic or not), any concentrate, any syrup, or any non-food product or non-food byproduct.

(4) No person may sell any raisins or any Zante currants for conversion into alcohol, brandy, wine, any other beverage (whether alcoholic or not), any concentrate, any syrup, or any non-food product or non-food by-product except to (i) the Office of Distribution (including, but not being limited to, any corporate agency thereof), or (ii) any person designated by the Director.

(5) On March 1 of each year each person, other than a packer, shall, without regard to existing con-

tracts, set aside for delivery to the Office of Distribution, or any person designated by the Director, all of the unprocessed raisins produced in the then immediately preceding calendar year, or owned by or under contract to, such person on said date, and hold such unprocessed raisins so set aside for a period of one year thereafter unless, during such period, said unprocessed raisins are acquired by the Office of Distribution or a person designated by the Director.

(6) No person may sell or deliver any raisin variety grapes, any Zante currant grapes, any raisins, or any Zante currants with knowledge or reason to believe that such quantity, or any portion thereof, thus sold or delivered is to be used in violation of this order.

(7) No dehydrator shall convert any raisin variety grapes into raisins by any method other than sun drying, unless specifically authorized by the Director.

(c) *Audits and inspections.* The Director shall be entitled to make such audit or inspection of the books, records and other writings, premises or stocks of raisin variety grapes, Zante currant grapes, raisins, and Zante currants of any person, and to make such investigations, as may be necessary or appropriate, in the Director's discretion, to the enforcement or administration of the provisions of this order.

(d) *Records and reports.* (1) The Director shall be entitled to obtain such information from, and require such reports and the keeping of such records by, any person, as may be necessary or appropriate,

in the Director's discretion, to the enforcement or administration of the provisions of this order.

(2) Every person subject to this order shall, for at least two years (or for such period of time as the Director may designate), maintain an accurate record of his transactions in raisin variety grapes, Zante currant grapes, raisins, and Zante currants.

(e) *Petition for relief from hardship.* Any person affected by this order who considers that compliance herewith would work an exceptional or unreasonable hardship on him may file a petition for relief with the Order Administrator. Such petition shall be addressed to Order Administrator, War Food Order No. 17, Fruit and Vegetable Branch, Office of Distribution, War Food Administration, Washington 25, D. C. Petition for such relief shall be in writing and shall set forth all pertinent facts and the nature of the relief sought. The Order Administrator may take any action with reference to such petition which is consistent with the authority delegated to him by the Director. If the petitioner is dissatisfied with the action taken by the Order Administrator on the petition, he shall obtain, by requesting the Order Administrator thereof, a review of such action by the Director. The Director may, after said review, take such action as he deems appropriate, and such action shall be final. The provisions of this paragraph (e) shall not be construed to deprive the Director of authority to consider originally any petition for relief from hardship submitted in accordance herewith. The Director may consider any such petition and take

such action, with reference thereto that he deems appropriate, and such action shall be final.

(f) *Violations.* Any person who violates any provision of this order may, in accordance with the applicable procedure, be prohibited from receiving, making any deliveries of, or using the material subject to priority or allocation control pursuant to this order. In addition, any person who wilfully violates any provisions of this order is guilty of a crime and may be prosecuted under any and all applicable laws. Further, civil action may be instituted to enforce any liability or duty created by, or to enjoin any violation of, any provision of this order.

(g) *Delegation of authority.* The administration of this order and the powers vested in the War Food Administrator, insofar as such powers relate to the administration of this order, are hereby delegated to the Director. The Director is authorized to redelegate to any employee of the United States Department of Agriculture any or all of the authority vested in him by this order.

(h) *Communications.* All reports required to be filed hereunder and all communications concerning this order shall, unless otherwise provided herein or in instructions issued by the Director, be addressed to the Director of Distribution, War Food Administration, Washington 25, D. C., Ref. WFO-17.

(i) *Effective Date.* This order shall become effective at 12:01 A.M. p.w.t., July 21, 1944. With respect to violations, rights accrued, liabilities incurred,

or appeals taken under said War Food Order No. 17, as amended, prior to the effective time of the provisions hereof, the provisions of said War Food Order No. 17, as amended, in effect prior to the effective time hereof shall be deemed to continue in full force and effect for the purpose of sustaining any proper suit, action, or other proceeding with regard to any such violation, right, liability, or appeal.

(E.O. 9280, 7 F.R. 10179; E.O. 9322, 8 F.R. 3807; E.O. 9334, 8 F.R. 5423; E.O. 9392, 8 F.R. 14783.)

Issued this 20th day of July 1944.

Ashley Sellers,
Acting War Food Administrator.

INDEX

	Page
Opinions below.....	1
Jurisdiction.....	1
Questions presented.....	2
Statement.....	3
1. The 1944 raisin program.....	3
2. The necessity for the 1944 raisin program.....	7
3. The proceedings below.....	11
Argument.....	12
Conclusion.....	20
Appendix.....	22

CITATIONS

Cases:

<i>American Bond & Mortgage Co. v. United States</i> , 52 F. 2d 318, certiorari denied, 285 U. S. 528.....	18, 20
<i>American Smelting & Refining Co. v. United States</i> , 259 U. S. 75.....	19, 20
<i>Booth Fisheries v. Industrial Commission</i> , 271 U. S. 208.....	19
<i>Carmichael v. Southern Coal Co.</i> , 301 U. S. 495.....	17
<i>Curran v. Wallace</i> , 306 U. S. 1.....	15
<i>Dayton-Goose Creek Ry. Co. v. United States</i> , 263 U. S. 456.....	17
<i>E. I. du Pont de Nemours & Co., Inc. v. Hughes</i> , 50 F. 2d 821.....	19, 20
<i>Gorrie v. Fox</i> , 274 U. S. 603.....	15
<i>Highland v. Russell Car & Snow Plow Co.</i> , 279 U. S. 253.....	15
<i>Hurley v. Commission of Fisheries</i> , 257 U. S. 223.....	19
<i>L. P. Stewart & Bro. v. Bowles</i> , 322 U. S. 398.....	15
<i>Moor v. Texas & N. O. R. Co.</i> , 75 F. 2d 386, appeal dismissed, 297 U. S. 101.....	18, 19
<i>Morriedale Coal Co. v. United States</i> , 259 U. S. 188.....	19, 20
<i>Mulford v. Smith</i> , 307 U. S. 38.....	17
<i>New England Divisions Case</i> , 261 U. S. 184.....	17
<i>Noble State Bank v. Haskell</i> , 219 U. S. 104.....	17
<i>North Dakota-Montana Wheat Growers' Association v. United States</i> , 66 F. 2d 573, certiorari denied, 291 U. S. 672.....	18
<i>Norts v. United States</i> , 294 U. S. 317.....	15
<i>Perry v. United States</i> , 294 U. S. 330.....	15
<i>Plymouth Coal Co. v. Pennsylvania</i> , 232 U. S. 531.....	15
<i>Railroad Retirement Board v. Alton R. Co.</i> , 295 U. S. 330.....	17
<i>Ruppert v. Caffey</i> , 251 U. S. 264.....	15
<i>St. Louis Co. v. Prendergast Construction Co.</i> , 260 U. S. 469.....	19
<i>Thompson v. Consolidated Gas Utilities Corp.</i> , 300 U. S. 55.....	17

II

Cases—Continued

	Page
<i>United States v. Golden Gate Bridge & Highway District</i> , 37 F. Supp. 505, affirmed, 125 F. 2d 872, certiorari denied, 316 U. S. 700.....	19
<i>United States v. Rock Royal Cooperative, Inc.</i> , 307 U. S. 533.....	13, 16, 17
<i>Wall v. Parrot Silver & Copper Co.</i> , 244 U. S. 407.....	19
<i>White Oak Coal Co. v. United States</i> , 15 F. 2d 474, certiorari denied, 273 U. S. 756.....	20
<i>Wickard v. Filburn</i> , 317 U. S. 111.....	17
<i>Yarnell v. Hillsborough Packing Company</i> , 70 F. 2d 435....	20
<i>Z. & F. Assets Corp. v. Hull</i> , 311 U. S. 470.....	20
 Statute:	
Second War Powers Act, Sec. 301 (a), March 27, 1942, c. 199, Tit. III, § 301, 56 Stat. 177; 50 U. S. C. App., Supp. V, 633.....	15
 Miscellaneous:	
Executive Order 9280 (7 F. R. 10179).....	14
Executive Order 9334 (8 F. R. 5423).....	14
War Food Order 17, Amendment 5 (9 F. R. 8768)....	4, 5, 19, 23

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1281

C. E. GRAY, J. C. PITTS AND FLOYD BROWN,
PETITIONERS

v.

COMMODITY CREDIT CORPORATION, A CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE NINTH
CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court for the Southern District of California (R. 105-142) is reported at 63 F. Supp. 386. The opinion of the Circuit Court of Appeals for the Ninth Circuit (R. 155-157) is reported at 159 F. 2d 243.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 28, 1947 (R. 157). The petition for a writ of certiorari was filed on April 23, 1947. The jurisdiction of this Court is invoked under the provisions of Section 240 (a) of

the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the court below erred in interpreting a contract entered into between respondent, as purchaser, and petitioners and several thousand other growers of Muscat and other raisin variety grapes, as sellers, as providing for the distribution of the proceeds to be derived from the resale of those grapes among all growers of raisin variety grapes *pro rata* in accordance with their production and regardless of the particular variety from which the proceeds were derived.¹

2. Whether petitioners have the standing to question the constitutionality of this common pool method of distribution.

3. Whether, if so, that program of distribution violates any provision of the Constitution.²

¹ For purposes of convenience, this method of distribution will be referred to as the common pool method, as contrasted with the separate variety pool method, urged by petitioners, under which the proceeds would be segregated into separate funds dependent on variety, and each fund distributed only to the growers of the particular variety contributing to the fund.

² Minor questions involved are:

4. Whether the producers of varieties of grapes other than the Muscat variety are indispensable parties, in whose absence petitioners cannot maintain this suit.

5. Whether petitioners are, in any event, entitled to invoke the relief of a court of equity.

STATEMENT

This case turns on the interpretation of Section 5 of a standard form of contract (R. 9-22) entered into between respondent, as purchaser, and several thousand growers of Muscat and other raisin variety grapes, as sellers.^a The genesis of the contract is to be found in the 1944 raisin program of the War Food Administration, of which respondent was a corporate agency. The facts which underlay its adoption, all stipulated below, are substantially as follows:

1. *The 1944 raisin program.* Raisins produced in this country are made almost exclusively from the Muscat, Thompson, and Sultana varieties of grapes—the “raisin variety grapes”—and through the natural process of sun-drying. Grapes so dried become “natural condition raisins” and are then sold to packers for stemming, cleaning, and, in some instances, seeding. Grapes so treated are “processed raisins.” Because of their high nutritional value, their relative non-perishability, and the ease with which they can be packed and shipped, raisins (and Zante Currants) are an essential wartime food item, of greater importance than fresh grapes (R. 41-44).

To stimulate the production of the raisin variety grapes needed for military and civilian

^a Section 5 of the contract is set out in the Appendix, *infra*, pp. 22-23.

raisin requirements in 1944, the War Food Administrator, on June 1, 1944, announced grower support prices on natural condition raisins of \$180.00 per ton for Thompsons and Sultanas, and \$195.00 per ton for Muscats. These support prices were fixed at the same levels as the ceiling prices established by the Office of Price Administration on grower or producer sales of natural condition raisins. In order to enable packers to pay such prices to growers and still secure reasonable profits on the resale of processed raisins, respondent entered into a program of subsidy payments to packers. All growers of raisin variety grapes, including petitioners, were thus assured of obtaining the ceiling prices for the natural condition raisins they produced from their grapes (R. 44-47).

In addition, since utilization of raisin variety grapes, as before, for purposes other than for raisin production—principally for beverage and table uses—would have meant a shortage for the essential raisin use, regulation of their disposition and use became necessary. Accordingly, on July 20, 1944, the War Food Administrator issued Amendment 5 to War Food Order 17 (9 F. R. 8768),⁴ placing restrictions on the sale, delivery, purchase, and use of the 1944 crop of raisin variety grapes and Zante Currants (R. 47-51, 64-65). The order imposed no limitation

⁴ This order is set out in the Appendix, *infra*, pp. 23-29.

on the conversion of raisin variety grapes into raisins by sun-drying, or on sales to dehydrators for such conversion, but, except as hereafter indicated, it did not permit any other disposition of raisin variety grapes by the grower. This restriction was designed to ensure that grapes would be devoted to raisin uses to the maximum extent possible (R. 63, 64-65).

It was recognized that there would be some raisin variety grapes which, either because of their condition or for other reasons, would not be converted or convertible into raisins. To permit the unrestricted sale of that residue, however, would have involved danger of diversion of grapes actually needed for raisins. Section 1407.2 (b) (1) of War Food Order 17, accordingly, permitted the sale of such grapes only to the Office of Distribution of the War Food Administration or to a corporate agency thereof, such as respondent. Thus, though an outlet was provided for growers, control was maintained over the disposition of grapes for non-raisin use (R. 63-65). A grower, therefore, had three principal legal alternatives under the Order:

- (1) to convert his grapes into raisins and to sell them in that form;
- (2) to sell them to a dehydrator for conversion into raisins; or
- (3) to sell them to the Office of Distribution.

To provide the third outlet mentioned, respondent undertook to purchase from growers who could not or did not wish to utilize either of the first two outlets: (a) raisin variety grapes not suitable for conversion into standard quality raisins; (b) damaged or substandard quality raisins; and (c) such quantities of raisin variety grapes as might be produced in excess of the amount determined by the War Food Administration to be needed for conversion into raisins (R. 63-64). Under the purchase program, growers, including petitioners, who wished to dispose of their grapes other than by sun-drying into raisins or by sale to dehydrators, made application to the War Food Administration Office in Fresno, California. If the War Food Administration approved, the applicant grower went to the office of respondent's agent and there signed the standard contract (R. 9-22); all growers who sold to respondent, including petitioners, followed the same procedure and signed identical contracts (R. 62-71).

Respondent entered into over 2,000 such contracts with growers. Only one contract was signed with each grower; it covered all the grapes he was to sell to respondent, regardless of whether they included one or more varieties. Approximately 12% of the contracting growers sold Sultanas, 27% sold Thompsons, and the remainder sold Muscats. The prices paid to the growers was \$43.00 per fresh ton for Thompsons and Sultanas, and \$50.00 per fresh ton for Muscats, the

equivalent, on a conversion basis, to the O. P. A. ceiling prices for grower sales of natural condition raisins of the same variety, and to the highest prices paid by dehydrators and dry-yard operators for fresh grapes sold to them (R. 72-79).

Respondent resold the grapes which it purchased under these contracts, principally to wineries, at prices in excess of those it paid for them. Resales were made on the basis of bids solicited and received by respondent, and bidders had no knowledge of the quantity of each variety available for resale. The bids received showed no substantial difference in demand (either on a price or a quantity basis) among the several varieties of grapes so resold, winery bids for Muscats averaging not more than \$5.00 per ton higher than for Thompsons; and, so far as quantity was concerned, the demand for Muscats was only slightly greater than that for Thompsons. From these resales of grapes, respondent realized net proceeds of approximately \$8,850,000.00 (R. 74-77). These proceeds constitute the fund referred to in Section 5 of the contract (R. 13-15), with reference to whose disposition the principal issues here arise.

2. The necessity for the 1944 raisin program.

The war necessity for imposing these restrictions on the disposition and use of raisin variety grapes arose from the following circumstances:

Prior to the institution, in 1942, of Government war controls on the disposition of raisin

variety grapes, there was no large or consistent difference in the prices paid for such grapes by various trade outlets and for various uses. Prices varied from year to year, by variety and by utilization, but the maximum variation among varieties and utilization in any one year never exceeded about \$5.00 per ton and averaged considerably less (R. 51-54). With the imposition of controls in 1942, the quantity and proportion of such grapes going into non-raisin channels was reduced (R. 58-59), and, as a result, grapes sold for non-raisin use could command substantially higher prices than those paid for raisins (on a conversion basis) or for grapes sold to raisin channels (R. 60-61). On the other hand, the ceiling prices on natural condition raisins were limiting factors, as a practical marketing proposition, both on the returns which growers could realize for drying their grapes and on the prices which dehydrators and other purchasers were willing to pay for grapes acquired for conversion into raisins (R. 72-73). Thus a large disparity arose and could reasonably be anticipated between the returns obtainable by a grower who converted his grapes into raisins or who sold them for such conversion, and the return which could be obtained for sales to non-raisin outlets (R. 61-62).

This disparity, if ignored, would have encouraged the diversion of grapes from raisin to non-

raisin uses and would have prejudiced a grower whose grapes were utilized for the essential raisin use as against one whose wartime grapes were ultimately diverted to the less important uses (R. 65-66). These two related factors created a very serious problem in connection with the operation of the 1944 raisin program, for that program necessarily depended on the avoidance of precisely such a diversion. The problem was discussed at Government and trade conferences held in Washington, D. C., and Fresno, California, during the spring and summer of 1944, and the Raisin Industry Advisory Committee recommended as a remedy that any proceeds derived by respondent from the resale of grapes acquired from growers should be pooled and distributed equally among all growers, in proportion to their production of grapes. When it made this recommendation, the Committee specifically rejected a proposal by a Muscat grower that the profits on the sale of each variety of grapes be kept in a separate pool and be distributed only among growers of that particular variety. (R. 61-62). This rejected proposal is in substance the equivalent of petitioners' interpretation of Section 5 of the contract.

Against this background, the War Food Administration and respondent approved and adopted the purchase program and the provisions of Section 5 of the contract. The common pool

feature was designed: (a) to avoid a situation in which it would be relatively disadvantageous for a grower to dispose of his grapes (or Zante Currants) in raisin channels; (b) to eliminate any financial incentive to divert grapes from raisin channels; and (c) to avoid the possibility that a grower of raisin variety grapes whose grapes were devoted to the essential raisin use would derive a smaller relative financial return than one whose grapes were devoted to a less important non-raisin use, in consequence of the market price differential favoring non-raisin uses (R. 65-66). Since all proceeds were to be pooled and distributed ratably among growers in proportion to production, a grower would neither gain nor lose by drying his grapes, as War Food Order 17 contemplated. He would therefore have no incentive to divert his grapes from the essential raisin use and could derive no artificial windfall from such diversion.

Section 5 also provides that the proceeds in the fund shall be first applied to the incentive payment to producers of sun-dried raisins, of \$10.00 for each ton of sun-dried raisins produced. This provision was adopted as part of the co-operative effort to secure the maximum conversion of grapes into raisins by sun-drying (R. 65), the additional labor and expense of sun-drying and the possibility of loss or damage due to hazards in the drying process (R. 42) being factors

which might have discouraged sun-drying, had this compensatory provision not been included.

As previously indicated, all growers who sold grapes to respondent did so only after first applying to the War Food Administration and then signing the standard form contract (R. 64). All of them followed the procedure described at R. 67-71. All growers, including petitioners, who signed the contracts have made application for payment of the purchase prices for the grapes they sold to respondent and, with exceptions not here material, all have been paid (R. 73-74). In addition, the petitioners Pitts and Brown, who were eligible for incentive payments under the contract, have applied for and received such payments (R. 78). Taking the program as a whole, the incentive payments made up to June 2, 1945, covered approximately 99% of the total eligible raisin tonnage, and payments were still being made at that date (R. 77).

3. *The proceedings below.* The present case, originally brought in the Superior Court of the State of California, was removed to the United States District Court for the Southern District of California (R. 28-29). The case was then argued and submitted on the complaint (R. 2-24), the answer (R. 31-41), and the Stipulation of Facts (R. 41-103). On November 1, 1945, the District Court, per Yankwich, J., handed down a comprehensive opinion (R. 105-142, 63 F. Supp. 386),

holding that the contracts in question were valid and did not violate petitioners' constitutional rights; that the Section 5 fund should be paid out according to the common pool method of distribution; that the Muscat growers were not entitled to have that portion of the fund derived from the sale of their grapes distributed to them as a separate pool; that petitioners, having entered into agreements for the sale of their grapes, and having thereafter accepted benefits thereunder, could not question the validity of those contracts. Judgment dismissing the complaint was accordingly entered on November 23, 1945 (R. 143-145).

Petitioners thereupon appealed to the United States Court of Appeals for the Ninth Circuit (R. 145-146), and on January 28, 1947, that court announced its *per curiam* opinion (R. 155-157), and entered a decree (R. 157) affirming the judgment of the District Court. The Circuit Court adopted Judge Yankwich's opinion, and, as an additional reason for affirmance, noted that respondent had recognized and fully compensated petitioners for the difference in value between the Muscat and other grape varieties, by paying petitioners and the other Muscat growers \$7.00 per ton more for their grapes (R. 156).

ARGUMENT

The decisions below are clearly correct. Nor do they conflict with any prior decisions of this Court, as petitioners suggest (Pet. 6). To the

contrary, the constitutional question sought to be raised here was decided unequivocally and adversely to petitioners, in *United States v. Rock Royal Co-operative, Inc.*, 307 U. S. 533. Review by this Court is, therefore, not warranted.

1. It is plain that Section 5 of the contract involved here (R. 13-15; *infra*, pp. 22-23) contemplates distribution of the proceeds derived from the resale of petitioners' and the other growers' grapes on a common, rather than on a separate variety pool basis. As Judge Yankwich put it, "Either Section 5 of contract means this or it means nothing else" (R. 121; 63 F. Supp. at 392).

The provisions for distribution are quite definite. The distinction between grape varieties is recognized only for one purpose, so far as distribution of the surplus fund is concerned: different conversion factors are established for grapes sold to dehydrators for each variety to take account of the difference in weight loss encountered by the several varieties in the drying process (R. 15). In all other respects, the grapes, whatever their variety, are treated as a single class, and there is not the faintest suggestion in Section 5 of any intention to segregate the proceeds derived from resales of each variety into separate funds.

Moreover, several extrinsic facts show that the common pool interpretation is entirely in accordance with intention and purpose. A proposal made by a Muscat grower that a separate fund

be created for each variety was rejected by the Industry Advisory Committee (R. 62). The announcement made by the War Food Administration describing the 1944 raisin program (R. 90-92) states that grapes purchased would be resold to the best advantage of "producers" and that the "net sales proceeds" would be distributed "among raisin variety grape producers affected by the order." Further, a grower shares in the pool regardless of whether he sold his grapes to ap-peelee or sun-dried all of them; petitioners concede this (Pet. 10-11, 16-17). Consequently, under petitioners' interpretation of Section 5, as between a Muscat and a Thompson grower, each of whom sun-dried all of his grapes, the Muscat grower would receive a larger distributive share of the proceeds, quite apart from the \$7.00 premium originally paid to him upon purchase by respondent—despite the fact that no part of the proceeds of the surplus fund was derived from a resale of the grapes of either of these two growers. There is obviously no rational basis for such a result.

2. The common pool method of distribution provided by Section 5 of the contract involves no deprivation of property and raises no substantial constitutional question.

a. Since raisins were an essential item of food in meeting military and civilian wartime needs, the War Food Administration, acting under Executive Order 9280 (7 F. R. 10179) and Executive

Order 9334 (8 F. R. 5423) (which delegated to it the allocation authority of the President under Section 301 (a) of the Second War Powers Act, March 27, 1942, c. 199, Tit. III, § 301, 56 Stat. 177; 50 U. S. C. App., Supp. V, 633), was clearly justified in prohibiting the sale of raisin variety grapes for non-raisin use, thus securing an adequate production of raisins. The restrictions imposed by War Food Order 17 were therefore well within the war power of the United States and plainly constitutional. *Highland v. Russell Car & Snow Plow Co.*, 279 U. S. 253; *L. P. Stewart & Bro. v. Bowles*, 322 U. S. 398.

b. Moreover, as the District Court found (R. 130, 135-136; 63 F. Supp. at 396, 399-400), since the Government's program assured petitioners at least the equivalent of the ceiling prices for their grapes, it caused them no injury and involved no deprivation. And constitutional protections are not impaired by action which produces no injury. *Gorieb v. Fox*, 274 U. S. 603, 606; *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 544-545; *Currin v. Wallace*, 306 U. S. 1, 18. Petitioners lost, at most, an opportunity to obtain an additional profit through the non-permissible diversion of grapes from raisin use to less essential non-raisin uses. Injury cannot be found in that circumstance. Cf. *Ruppert v. Caffey*, 251 U. S. 264; *Perry v. United States*, 294 U. S. 330, 357, 358; *Nortz v. United States*, 294 U. S. 317, 330.

c. Nor do any due process considerations support petitioners' objections to the common pool method of distribution. *United States v. Rock Royal Co-Operative, Inc.*, 307 U. S. 533. There, in order to meet the problems arising from the facts that milk commanded different prices for different utilizations, fluid milk being the most profitable outlet, and that, in consequence, there was sharp competition in the fluid milk market which itself tended to drive prices down, the Government's order provided for a pooling of returns, so that all producers ultimately received uniform prices for their milk regardless of the uses for which it was sold. This equalization pool was attacked on due process grounds, the defendant objecting to it as an ancillary feature of the minimum price regulation. In sustaining the validity of the pool against defendant's contentions, this Court said (307 U. S. at 572, 573):

* * * *The pool is only a device reasonably adapted to allow regulation of the interstate market upon terms which minimize the results of the restrictions.* * * *

Common funds for equalizing risks are not unknown and have not been considered violative of due process. The pooling principle was upheld in workmen's compensation, bank deposit insurance, and distribution of benefits in the Transportation Act.

* * * In this case, the pooling has differentials to cover the variations of quality and location. [Italics supplied.]

We submit that the *Rock Royal* case is completely dispositive of the constitutional issues involved in the present proceeding.⁵ In both cases, in order to aid in effectuating a valid restriction and to mitigate the inequitable incidents thereof, a pool was created so that all producers would be treated alike. In both, fortuitous advantages were eliminated. There, as here, particular producers lost the benefits of the additional profits they might have made through sales to more profitable outlets. A device which can be validly adopted in aid of industry stabilization in peace is surely not less available in aid of the allocation power in time of war. See, also, *Noble State Bank v. Haskell*, 219 U. S. 104; *New England Divisions Case*, 261 U. S. 184; *Dayton-Goose Creek Ry. Co. v. United States*, 263 U. S. 456, 484; *Carmichael v. Southern Coal Co.*, 301 U. S. 495, 521. And cf. *Mulford v. Smith*, 307 U. S. 38; *Wickard v. Filburn*, 317 U. S. 102.⁶

⁵ *Thompson v. Consolidated Gas Utilities Corp.*, 300 U. S. 55, and *Railroad Retirement Board v. Alton R. Co.*, 295 U. S. 330, notwithstanding petitioners' suggestion to the contrary (Pet. 6), are no more in conflict with the decisions below in this case than they were with this Court's ruling in *Rock Royal*, where they were clearly distinguished. See 307 U. S. at 573.

⁶ In *Wickard v. Filburn*, 317 U. S. 111, 131, 133, this Court said:

"* * * We can hardly find a denial of due process in these circumstances, particularly since it is even doubtful that appellee's burdens under the program outweigh his benefits. It is hardly lack of due process for the Government to regulate that which it subsidizes.

3. In any event, as the District Court held (R. 130-133; 63 F. Supp. at 396-398), petitioners have no standing to maintain this action. They made application under War Food Order 17 for permission to dispose of their grapes other than by the permissible courses of sun-drying or sale to raisin channels. They were all then authorized, under the order, to sell their grapes to respondent. The approval of such sales opened to them a legally permissible alternative outlet, under the order, for grapes which they could not or did not wish to move into essential raisin channels. They utilized the outlet so made available to them by contracting with and delivering their grapes to respondent. Having made application under the order, having relied on its provisions, and having accepted the benefit of the approval thereunder of a non-raisin outlet for their grapes, petitioners, on well-established principles, may not now attack its validity. *Moor v. Texas & N. O. R. Co.*, 75 F. 2d 386 (C. C. A. 5), appeal dismissed, 297 U. S. 101; *American Bond & Mortgage Co. v. United States*, 52 F. 2d 318 (C. C. A. 7), certiorari denied, 285 U. S. 538; *North Dakota-Montana Wheat Growers' Association v. United States*, 66 F. 2d 573 (C. C. A. 8), certiorari denied, 291 U. S.

"* * * That appellee is the worse off for the aggregate of this legislation does not appear; it only appears that, if he could get all that the Government gives and do nothing that the Government asks, he would be better off than this law allows. To deny him this is not to deny him due process of law." [Italics supplied.]

672; *Wall v. Parrot Silver & Copper Co.*, 244 U. S. 407; *St. Louis Co. v. Prendergast Construction Co.*, 280 U. S. 469; *Hurley v. Commission of Fisheries*, 257 U. S. 223; cf. *Booth Fisheries v. Industrial Commission*, 271 U. S. 208, 211; *United States v. Golden Gate Bridge & Highway District*, 37 F. Supp. 505 (N. D. Calif.), affirmed, 125 F. 2d 872 (C. C. A. 9), certiorari denied, 316 U. S. 700. Actually, had petitioners made no specific application under War Food Order 17, their entry into the contracts with and deliveries of grapes to respondent, as permitted by Section 1407.2 (b) (1) of the order, would itself have constituted a complete election to accept and to proceed under the order. *E. I. du Pont de Nemours & Co., Inc. v. Hughes*, 50 F. 2d 821 (C. C. A. 3); see also, *American Smelting & Refining Co. v. United States*, 259 U. S. 75; *Morrisdale Coal Co. v. United States*, 259 U. S. 188.

Contrary to petitioners' contention (Pet. 19-20), no duress can be implied from the circumstances involved. That petitioners may have been yielding to the economic need for finding an alternative outlet for their grapes, owing to their unwillingness or inability to sun-dry them or to sell them to dehydrators, does not constitute unlawful duress, as Judge Yankwich aptly noted (R. 134-136; 63 F. Supp. at 399-400). Any such contention ignores the very basis of decision in cases dealing with estoppels of this character. *Moor*

v. Texas & N. O. R. Co., 75 F. 2d 386 (C. C. A. 5), appeal dismissed, 297 U. S. 101; *American Bond & Mortgage Company v. United States*, 52 F. 2d 318 (C. C. A. 7), certiorari denied, 285 U. S. 538; *Yarnell v. Hillsborough Packing Company*, 70 F. 2d 435 (C. C. A. 5); cf. *American Smelting & Refining Co. v. United States*, 259 U. S. 75; *White Oak Coal Co. v. United States*, 15 F. 2d 474 (C. C. A. 4), certiorari denied, 273 U. S. 756; *Morrisdale Coal Co. v. United States*, 259 U. S. 188; *E. I. duPont de Nemours & Co., Inc. v. Hughes*, 50 F. 2d 821 (C. C. A. 3).

The real answer, of course, is that petitioners are not in any sense rejecting the contract whose validity they here impugn. They accepted it, they proceeded under it, and they were paid for their grapes under it; they now assert a right to incentive payments under it and rely on it for purposes of distribution of the proceeds. As this Court said, in *Z. & F. Assets Corp. v. Hull*, 311 U. S. 470, 486:

But as their standing rests solely upon the provisions of the Act, they may not escape its terms or succeed in a challenge to payments for which the Act is found to provide.

CONCLUSION

The decision below is clearly correct and there is no conflict. The constitutional contention is not substantial. It is therefore respectfully submitted

that the petition for a writ of certiorari should be denied.

✓ GEORGE T. WASHINGTON,
Acting Solicitor General.

PEYTON FORD,
Acting Assistant Attorney General.

PAUL A. SWEENEY,
HARRY I. RAND,

Attorneys.

MAY 1947.

APPENDIX

1. Section 5 of standard form Government contract entered into between petitioners and the Commodity Credit Corporation reads as follows:

SECTION 5. Profits. The proceeds derived by Commodity from the sales of Grapes and Raisins purchased by Commodity under this and similar Producers Agreements with respect to Grapes and Raisins produced in 1944 or converted into Raisins in 1944 shall be used to defray the cost of such Grapes and Raisins and incidental expenses thereto, including but not limited to inspection and transportation costs and to pay the expenses incurred by Commodity or its agencies in the acquisition and disposition of such Grapes and Raisins and the remainder shall be distributed in the following manner and order of priority:

1. An incentive payment at the rate of \$10 per ton shall be made to each Producer of sun dried raisins (not including sulphur bleached and soda bleached raisins) and each Producer of Zante Currants for the quantity of such sun dried raisins and Zante Currants produced in 1944 and sold to Packers prior to March 1, 1945, provided, however, that if the available fund is insufficient to make payments at the rate of \$10 per ton, such fund will be distributed to such Producers on a pro rata basis.

2. The balance of the fund, if any, will be distributed pro rata on fresh tonnage basis to all Growers of raisin variety grapes and Zante Currant grapes grown in 1944,

Kern, Kings, Tulare, Fresno, Madera, Merced, Stanislaus, and San Joaquin Counties in the State of California; the number of tons determined to have been produced by each Grower will include only grapes which have been converted into raisins or Zante Currants and sold to Packers prior to March 1, 1945. Grapes sold to dehydrators for conversion into raisins. Grapes substandard or damaged Grapes and Raisins sold to WFA, and Grapes sold to canneries to be used in the manufacture of fruit cocktail. The conversion factor for California and Thompson Seedless raisins to fresh grapes will be 1 to 4; muscats 1 to 3.75; Zante Currants 1 to 6. Partially dried substandard raisins will be converted to green tons by dividing the price paid by commodity for a given lot by the applicable price in Schedule A at 79% moisture and multiplying that figure by the number of tons in the lot.

Amendment 5 to War Food Order 17 (9-2-68), War Food Administration, is as follows:

WFO 17 Amdt. JULY 20, 1944.

WAR FOOD ADMINISTRATION

(WFO 17, Amdt. 5)

PART 1407—DRIED FRUIT

Raisin Variety Grapes, Zante Currant Grapes, Raisins, and Zante Currants

War Food Order No. 17, as amended, E. R. 4321, 4319 (formerly designated as Food Distribution Order No. 17, as originally issued by the Secretary of Agriculture

on January 30, 1943, and as amended, 8 F. R. 1706, 12042), is further amended to read as follows:

§ 1407.2. Restrictions relative to raisin variety grapes. Zante Currant grapes, raisins, and Zante Currants—(a) Definitions. (1) "Person" means any individual, partnership, corporation, association, business trust, or any organized group of persons, whether incorporated or not.

(2) "Director" means the Director of Distribution, War Food Administration.

(3) "Raisin variety grapes" means Thompson Seedless, Muscat, and Sultana grapes, grown in Fresno, Kern, Kings, Madera, Merced, Stanislaus, San Joaquin or Tulare Counties in the State of California, in the fresh or partially dried form.

(4) "Zante Currant grapes" means the grapes of the Zante Currant variety, grown in Fresno, Kern, Kings, Madera, Merced, Stanislaus, San Joaquin, or Tulare Counties in the State of California, in the fresh or partially dried form.

(5) "Raisins" means raisin variety grapes preserved by the removal of a part of the natural moisture, and includes such fruit in the processed or unprocessed condition.

(6) "Zante Currants" mean Zante Currant grapes preserved by the removal of a part of the natural moisture, and includes such fruit in the processed or unprocessed condition.

(7) "Processing" means grading, sizing, stemming, seeding, or treating raisins or Zante Currants by the use of water, steam, chemicals, or compressed or hot air.

(8) "Producer" means any person engaged in the production of raisin variety

grapes or Zante Currant grapes; and such terms includes, but is not limited to, any owner of such grapes at the time of the harvesting or picking of such grapes.

(9) "Packer" means any person engaged in the business of processing and packaging raisins or Zante Currants.

(10) "Dehydrator" means any person engaged in the business of drying raisin variety grapes or Zante Currant grapes by the use of artificial heat or by sun drying.

(b) Restrictions. (1) No producer may sell or deliver any raisin variety grapes or any Zante Currant grapes, except to (i) the Office of Distribution (including, but not being limited to, any corporate agency thereof), or (ii) any person designated by the Director, or (iii) any dehydrator for the purpose of converting such grapes into raisins or Zante Currants. No producer may, unless specifically authorized by the Director, use more than 100 pounds of raisin variety grapes or Zante Currant grapes during each calendar year for any purpose other than for conversion into raisins or Zante Currants.

(2) No person may, unless specifically authorized by the Director, purchase or accept delivery of any raisin variety grapes or any Zante Currant grapes for any purpose other than for conversion into Raisins or Zante Currants.

(3) No person may, unless specifically authorized by the Director, purchase, accept delivery of, or use any raisins or any Zante Currants for conversion into alcohol, brandy, wine, any other beverage (whether alcoholic or not), any concentrate, any syrup, or any non-food product or non-food byproduct.

(4) No person may sell any raisins or any Zante Currants for conversion into alcohol, brandy, wine, any other beverage (whether alcoholic or not), any concentrate, any syrup, or any non-food product or non-food byproduct except to (i) the Office of Distribution (including, but not being limited to, any corporate agency thereof), or (ii) any person designated by the Director.

(5) On March 1 of each year each person, other than a packer, shall, without regard to existing contracts, set aside for delivery to the Office of Distribution, or any person designated by the Director, all of the unprocessed raisins produced in the then immediately preceding calendar year, or owned by or under contract to, such person on said date, and hold such unprocessed raisins so set aside for a period of one year thereafter unless, during such period, said unprocessed raisins are acquired by the Office of Distribution or a person designated by the Director.

(6) No person may sell or deliver any raisin variety grapes, any Zante Currant grapes, any raisins, or any Zante Currants with knowledge or reason to believe that such quantity, or any portion thereof, thus sold or delivered is to be used in violation of this order.

(7) No dehydrator shall convert any raisin variety grapes into raisins by any method other than sun drying, unless specifically authorized by the Director.

(c) Audits and inspections. The Director shall be entitled to make such audit or inspection of the books, records and other writings, premises or stocks of raisin variety grapes, Zante Currant grapes, raisins, and Zante Currants of any person, and to

make such investigations, as may be necessary or appropriate, in the Director's discretion, to the enforcement or administration of the provisions of this order.

(d) Records and reports. (1) The Director shall be entitled to obtain such information from, and require such reports and the keeping of such records by, any person, as may be necessary or appropriate, in the Director's discretion, to the enforcement or administration of the provisions of this order.

(2) Every person subject to this order shall, for at least two years (or for such period of time as the Director may designate), maintain an accurate record of his transactions in raisin variety grapes, Zante Currant grapes, raisins, and Zante Currants.

(e) Petition for relief from hardship. Any person affected by this order who considers that compliance herewith would work an exceptional or unreasonable hardship on him may file a petition for relief with the Order Administrator. Such petition shall be addressed to Order Administrator, War Food Order No. 17, Fruit and Vegetable Branch, Office of Distribution, War Food Administration, Washington 25, D. C. Petition for such relief shall be in writing and shall set forth all pertinent facts and the nature of the relief sought. The Order Administrator may take any action with reference to such petition which is consistent with the authority delegated to him by the Director. If the petitioner is dissatisfied with the action taken by the Order Administrator on the petition, he shall obtain, by requesting the Order Administrator therefor, a review of such action by the

Director. The Director may, after said review, take such action as he deems appropriate, and such action shall be final. The provisions of this paragraph (e) shall not be construed to deprive the Director of authority to consider originally any petition for relief from hardship submitted in accordance herewith. The Director may consider any such petition and take such action with reference thereto that he deems appropriate, and such action shall be final.

(f) Violations. Any person who violates any provision of this order may, in accordance with the applicable procedure, be prohibited from receiving, making any deliveries of, or using the material subject to priority or allocation control pursuant to this order. In addition, any person who wilfully violates any provision of this order is guilty of a crime and may be prosecuted under any and all applicable laws. Further, civil action may be instituted to enforce any liability or duty created by, or to enjoin any violation of, any provision of this order.

(g) Delegation of authority. The administration of this order and the powers vested in the War Food Administrator, insofar as such powers relate to the administration of this order, are hereby delegated to the Director. The Director is authorized to redelegate to any employee of the United States Department of Agriculture any or all of the authority vested in him by this order.

(h) Communications. All reports required to be filed hereunder and all communications concerning this order shall, unless otherwise provided herein or in instructions issued by the Director, be ad-

addressed to the Director of Distribution, War Food Administration, Washington 25, D. C., Ref. WFO-17.

(i) Effective date. This order shall become effective at 12:01 a. m., p. w. t., July 21, 1944. With respect to violations, rights accrued, liabilities incurred, or appeals taken under said War Food Order No. 17, as amended, prior to the effective time of the provisions hereof, the provisions of said War Food Order No. 17, as amended, in effect prior to the effective time hereof shall be deemed to continue in full force and effect for the purpose of sustaining any proper suit, action, or other proceeding with regard to any such violation, right, liability, or appeal.

Note: All record-keeping requirements of this order have been approved by, and subsequent reporting and record-keeping requirements will be subject to the approval of, Bureau of the Budget in accordance with the Federal Reports Act of 1942.

(E. O. 9280, 7 F. R. 10179; E. O. 9322, 8 F. R. 3807; E. O. 9334, 8 F. R. 5423; E. O. 9392, 8 F. R. 14783.)

Issued this 20th day of July, 1944.

ASHLEY SELLERS,
Acting War Food Administrator.